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April 6, 2009

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing  
Date of Filing: January 8, 2009  
Case Number: TSO-0696

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the individual) to hold an access authorization (or security clearance) under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual should be granted an access authorization. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should grant the individual an access authorization.

**I. Background**

The individual is an employee of a DOE contractor. In the course of completing a Questionnaire for National Security Positions (QNSP) in January 2008, the individual indicated that he had been subject to a non-judicial disciplinary proceeding while serving in the armed forces. Exhibit 8 at 41.<sup>2</sup> The local DOE security office (LSO) conducted a Personnel Security Interview (PSI) in August 2008 to inquire more deeply into these matters. Exhibit 9. The PSI did not resolve the LSO's concerns about the individual's actions that led to the disciplinary proceeding, which concerned violating a number of laws and regulations. The LSO ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

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<sup>1</sup> Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

<sup>2</sup> The individual completed an electronic form of the QNSP, entitled Electronic Questionnaire for Investigations Processing, or e-QIP.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual had engaged in conduct that tended to show that he was not honest, reliable, or trustworthy because he had willfully violated federal law and U.S. military policy when he mailed a firearm to his wife by U.S. Mail. Exhibit 1 (citing 10 C.F.R. § 710.8(l)).<sup>3</sup>

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on January 22, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual and three witnesses with whom he served in the military, one of whom is his current supervisor. The DOE Counsel submitted nine exhibits prior to the hearing, and the individual submitted 16 exhibits.

## **II. Regulatory Standard**

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).<sup>4</sup> After due deliberation, I have determined that the

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<sup>3</sup> Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any unusual circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . .” 10 C.F.R. § 710.8(l) (Criterion L).

<sup>4</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, including knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of

individual should be granted an access authorization. The specific findings that I make in support of this decision are discussed below.

### **III. The Notification Letter and the Security Concerns at Issue**

In the Notification Letter, the LSO sets forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cites the following derogatory information, provided by the individual during his PSI, for its security concerns under Criterion L. In the course of the PSI, the individual admitted that the military had made him aware of the U.S. Postal Service laws and the military regulations against shipping firearms through the U.S. Mail; nevertheless, the individual made a conscious decision to mail a firearm home to his wife from his duty station in a foreign country using the U.S. Mail.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criterion L. Conduct that involves questionable judgment, dishonesty, or unwillingness to comply with rules and regulations—in this case, knowingly violating a federal law and military policy—can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. See Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines).

### **IV. Findings of Fact**

The relevant facts in this case are not in dispute. The individual joined the military in 1984, and held a military security clearance from 1986 to 2005. While stationed in a foreign country in 2005, the individual received a pistol from a citizen of that country, who chose to give it to U.S. military personnel rather than have it confiscated by local authorities. Ex. 9 (PSI) at 13. Because the individual appreciated the uniqueness of the pistol, he kept it in his barracks as a conversation piece. *Id.* When he learned that his tour of duty was about to end, he, like others in his unit, began to ship extra items home. *Id.* at 12. One of the items he placed in a shipping box to be mailed home was the pistol that was the gift from the foreign citizen. *Id.* Although the individual provided a list of the box's contents, as required by the mailroom, he did not include the pistol on that list. *Id.* at 27. Upon inspecting the box, military mail inspectors discovered the pistol and filed a report with, and shipped the pistol to, criminal investigators at the individual's base. Ex. 7. The criminal investigation was terminated when the action commander indicated that he would address the individual's misconduct through a non-judicial proceeding pursuant to Article 15 of the Uniform Code of Military Justice. *Id.* In the Article 15 proceeding,

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rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

the commander determined the individual had violated two general orders, “by wrongfully possessing a privately owned firearm” and “by wrongfully shipping a firearm out of the” foreign country.” *Id.* As punishment, the individual was required to perform extra duty and his pay was reduced for two months. *Id.* Approximately nine months later, the individual retired, receiving an honorable discharge. *Id.*

The individual then applied for a position with a DOE contractor. In the course of applying for a DOE security clearance, the individual completed a QNSP, in which he indicated that he had been the subject of an Article 15 proceeding, and provided further details at his PSI.

Before being deployed overseas in 2005, the individual received briefings that informed him, among other things, that using the U.S. Mail to ship weapons was against U.S. military general orders. *Id.* at 16. In addition, the mailroom at his duty station had signs posted that informed him that weapons were prohibited items that could not be shipped by U.S. Mail. *Id.* at 17-18, 32. Throughout this proceeding, the individual has admitted that he was aware of the orders, as well as the mail regulations, that prohibited shipping a firearm through the U.S. Mail. *Id.* at 18, 23, 28, 50; Transcript of Hearing (Tr.) at 67. When asked at the PSI why he mailed the pistol home in spite of the prohibitions against doing so, he stated two reasons: the pistol was very unusual, and he was upset at having recently been passed over for a promotion. PSI at 33. At the hearing, he also added that he had heard, but had no personal knowledge, that others had succeeded in sending prohibited items home through the mail. Tr. at 57.

## **V. Hearing Officer Evaluation of Evidence**

The individual admits that he shipped a firearm by U.S. Mail, which is an activity prohibited by federal postal service laws as well as military regulations. This conduct alone raises a substantial security concern, which is exacerbated by the fact that the individual knew that he was violating those laws and regulations at the time he engaged in the proscribed activity. The individual’s conduct therefore demonstrates that, at least at the time of this conduct, he employed questionable judgment and possessed an unwillingness to comply with rules and regulations, which raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. *See* Guideline E. As hearing officer, however, my evaluation of an individual’s eligibility for access authorization does not end with such a finding. I must consider all of the evidence before me that relates to the individual’s character and personal history, including any information that tends to mitigate the concerns that this activity raised, with the object of rendering an adjudication on the basis of the “whole person” and not merely a series of events taken out of context. *See* Adjudicative Guidelines at ¶ 2(a). Despite his knowing violation of a number of laws and regulations in that single activity in 2005, a common-sense consideration of all the evidence leads me to conclude that he is in fact at low risk disregarding laws, rules, and regulations of any sort in the future.

First, the conduct that led to the Article 15 proceeding appears to be an isolated instance of unwillingness to comply with rules and regulations. There is no evidence in the record that the

individual has ever been charged with any other offenses, before, during, or after his military service. To the contrary, his last three performance evaluations for his military service and his Certificate of Discharge indicate that he was an exemplary soldier, but for the activities that led to the Article 15 proceeding. Exs. 7, K, L, M; Tr. at 38. The two witnesses at the hearing who had served in the military with the individual testified that he is honest and trustworthy. Tr. at 13, 30. One of those witnesses stated that when the individual told him he had just done “something stupid,” the witness found it “out of character” for the individual to have violated the regulations. *Id.* at 14. A third witness, who met the individual in the military and has been his supervisor for the past 17 months, considered him a trustworthy employee and an “outstanding individual,” and stated that the military awards bestowed upon him, including a Purple Heart and a Bronze Star, indicated that his superior officers thought highly of him as well. *Id.* at 40-42. Eleven letters of recommendations in the record, all but one of which was written by individuals who served in the military with him, echo the sentiments expressed in the testimony: that he was trusted to make good decisions, and that he is honest, does not cut corners, and acts with integrity. Exs. A-I, O, P.

Second, the manner in which the individual responded once he was caught at his deception reflects the character assessments in the record. He immediately and consistently admitted his wrongdoing, without excuse or justification. When questioned about his conduct during the PSI, the individual stated that he knew the pistol was contraband under postal regulations, PSI at 18, and that mailing it was against military regulations. *Id.* at 23. When applying for his current position, he raised the matter of his Article 15 proceeding to his prospective employer “to make sure that we were aware of it.” Tr. at 43 (testimony of supervisor). At each stage of this proceeding, he has admitted that he exercised poor judgment when he decided to ship the pistol, and let his impulses overtake common sense. PSI at 33, 49; Tr. at 77. He has consistently and convincingly stated that he was and is regretful, ashamed, and embarrassed by the 2005 event, not only to those processing his application for access authorization, but to his friends as well. PSI at 71; Tr. at 86; Tr. at 14, 16, 36 (testimony of witnesses).

Third, the individual explained the effect on him of the punishment he received as a result of the Article 15 proceeding. He regarded and accepted the punishment as a means for correcting behavior. Tr. at 69. He testified that he learned a valuable lesson from it: that one should not let one’s impulses interfere with good judgment. *Id.* at 77. The record demonstrates that the individual has carried this lesson over to his civilian life in at least two ways. The individual has not received so much as a parking violation since 2005, nor has he received any reprimands or admonitions at work. *Id.* at 87. More significantly, he has passed the lesson he learned on to his sons, who are themselves in the military: “Bottom line, short and sweet, was to use your good judgment, follow the rules and do the right thing; . . . as I tell them, ‘This one incident has followed me now for years; don’t let the same thing happen to you.’” *Id.* at 81.

The individual’s military record, recommendations, demeanor, and explanation of the lessons he has learned from his Article 15 proceeding all demonstrate to me that he will no longer employ the questionable judgment he employed in 2005 when faced with decisions in the future. The

2005 incident is an isolated event, and the lapse of judgment that engendered the incident is isolated as well. Moreover, the punishment the individual received has taught him a lesson that he will carry with him well into the future. Finally, his honest, straightforward approach to accepting full responsibility for his actions, disclosing the facts fully and voluntarily to the LSO and throughout this proceeding, further mitigates the LSO's security concerns regarding the individual. After considering the "whole person," I am convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See* Adjudicative Guidelines at ¶ 2(a). I therefore find that the individual has sufficiently mitigated the LSO's concerns under Criterion L.

## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth evidence to sufficiently mitigate the security concerns. I therefore find that granting the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date: April 6, 2009